

Hon. Ronald B. Leighton

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

FREEDOM FOUNDATION, a Washington State Nonprofit Corporation,)
Plaintiff,)
v.)
WASHINGTON DEPARTMENT OF ECOLOGY, a Washington State Agency;)
SANDI STEWART, in her official capacity as Director of Human Resources for the Washington Department of Ecology,)
Defendants.)
Civil Action No. 3:18-cv-05548-RBL

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Freedom Foundation hereby files this Complaint against Defendant and alleges as follows:

INTRODUCTION

1. This civil rights action seeks to vindicate Freedom Foundation's freedom of speech guaranteed by the First Amendment to the United States Constitution. The Washington Department of Ecology violated that right in December 2017 by prohibiting Freedom Foundation from handing out leaflets in the Department's public lobby because Ecology disapproved Freedom Foundation's message. The Department continues to violate those rights by maintaining an on-

1 going policy that excludes Freedom Foundation canvassers from the public areas in Department
2 headquarters while allowing advocacy and expression from other outside organizations.

3 **JURISDICTION AND VENUE**

4 2. This case is brought pursuant to 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 2201 and
5 2202.

6 3. This Court has subject matter jurisdiction based on 28 U.S.C. §§ 1331 and 1333(a)(3)
7 and (4).

8 4. Venue in this Court is appropriate pursuant to 28 U.S.C. § 1331(b) and intradistrict
9 assignment to the Tacoma federal district court is proper under LCR 3(e)(1) because all relevant
10 events occurred in Thurston County, Washington.

11 **PARTIES**

12 5. The Freedom Foundation is a 501(c)(3) nonprofit organization with offices in Washington,
13 Oregon, and California.

14 6. The Washington Department of Ecology is a Washington State agency headquartered in
15 Lacey, Washington. Sandi Stewart is the human resources director for the Washington Department
16 of Ecology.

17 **FACTUAL BACKGROUND**

18 7. Freedom Foundation was founded in 1991 as the Evergreen Freedom Foundation. Its
19 mission is to advance individual liberty, free enterprise, and limited, accountable government. Its
20 work includes public advocacy, research, canvassing, and litigation.

21 8. The clash between constitutional rights and compulsory unionization is Freedom
22 Foundation's highest priority.

23 9. Freedom Foundation employs canvassers who seek to inform public-sector workers of their
24 right to opt out of the political portion of union dues. These canvassers visit government offices
25 and other locations throughout the year as part of various information campaigns.

1 10. As part of Freedom Foundation's canvassing activities, Freedom Foundation has sent one
2 to two canvassers dressed in Santa costumes to state agency buildings during the month of
3 December, beginning in 2015.

4 11. Freedom Foundation canvassers have met with occasional resistance from the public-sector
5 union and government officers while performing these activities.

6 12. In December 2015, canvassers visited the Department of Ecology, the Department of
7 Enterprise Services, the Department of Natural Resources, the Department of Labor & Industries,
8 and Washington's Lottery.

9 13. Canvassers in 2015 met with resistance at the Department of Ecology, the Department of
10 Natural Resources, and the Department of Enterprise Services.

11 14. On December 15, 2015, two Freedom Foundation canvassers entered the lobby of the
12 Department of Enterprise Services. The building manager told them that they had to leave. The
13 Freedom Foundation staff stated they believed they had a right to hand out information in the
14 public areas of the building. The building manager then called 911. An Olympia police officer and
15 a State Patrol officer soon arrived, and the officers confirmed that the Freedom Foundation
16 employee could leaflet inside the building.

17 15. Around the same time, a Freedom Foundation canvasser dressed as Santa Claus visited the
18 Department of Natural Resources. He was asked to leave the cafeteria, but he declined to leave the
19 building entirely. Washington State Patrol officers once again arrived and agreed that Santa could
20 stay and leaflet.

21 16. Around the same time, a Freedom Foundation canvasser in holiday attire also visited the
22 Department of Ecology. The front desk informed Santa that he could distribute his handouts in the
23 lobby, and a security guard told him that he could enjoy access to the whole building if he signed
24 in. After learning that Santa would be handing out information contrary to the union's interests,
25 however, the security guard escorted Santa from the building, stating: "We have a good
26 relationship with our union and they don't want you here."

1 17. The Freedom Foundation Santa contacted the Foundation's staff attorneys, who drove to
 2 the Department. After the Freedom Foundation attorneys spoke with the security guard, the guard
 3 allowed Santa to enter the lobby and other areas accessible to the public to leaflet, and Ecology
 4 employees invited him to join a lunch party, where he explained the right to opt out.

5 18. The Freedom Foundation's 2015 holiday canvassing at the Department of Labor &
 6 Industries and Washington's Lottery occurred outside, although the Department of Labor &
 7 Industries informed Freedom Foundation that they could leaflet inside if they wished.

8 19. In 2016, the Freedom Foundation continued the holiday canvassing tradition in Oregon,
 9 but not in Washington.

10 20. In 2017, Freedom Foundation again engaged in holiday canvassing in Washington. One or
 11 two Freedom Foundation employees, dressed in holiday costumes, visited the Department of
 12 Ecology, the Department of Transportation, the Parks and Recreation Commission, and the Social
 13 and Health Services Department, among other locations in Olympia.

14 21. About a week prior to Freedom Foundation's visit to Ecology, on November 30, 2017, the
 15 Washington Federation of State Employees (WFSE) held an event in the Ecology lobby area from
 16 10:00 a.m. to 2:00 p.m. An email sent earlier that morning from the union (Exhibit 1) described
 17 the event:

18 We need to talk with you about about impending National Right to Work for all
 19 public employees, what it means for our future, and how we can fight back to
 20 protect working people through our 100% union campaign. 100% union members
 will be entered into a drawing to win 1 of 3 \$25 gift cards.

21 We are also launching a campaign at Ecology to address pay inequity for
 22 Environmental Specialists. According to the last salary survey, Environmental
 23 Specialists are paid more than 27% below market rate. We have a petition that we
 24 need your support on that asks ECY management to address this pay inequity in the
 25 next round of bargaining in order to ensure the stability and integrity of Ecology's
 mission. We will also be using these petitions to make a collective bargaining
 proposal to our union's negotiations team.

26 22. In addition to the November 30 union meeting, Freedom Foundation learned that someone
 27 had posted pictures in Ecology's lobby displaying portrait-style photos of several individuals

1 above a caption stating, “These people want to know your birthday” and “right to work.” Upon
 2 information and belief, the pictured individuals were Freedom Foundation employees.

3 23. Around the same time as the union’s lobby event, Freedom Foundation scheduled holiday
 4 canvassing for early December and notified the Washington State Patrol of their canvassing plans.
 5 Freedom Foundation canvassers also spoke with security or human resources at each location prior
 6 to canvassing.

7 24. On December 1, 2017, Freedom Foundation employee Matthew Hayward requested an
 8 appointment to meet with the head of human resources, Sandi Stewart. On December 7,
 9 Mr. Hayward held a scheduled meeting over the phone with Ms. Stewart.

10 25. At the meeting, Ms. Stewart informed Mr. Hayward that Ecology would not allow Freedom
 11 Foundation to leaflet anywhere in the building. Ms. Stewart referenced policies that allegedly
 12 would not permit Freedom Foundation’s use of the lobby for leafletting, although she did not
 13 provide a citation to such policies or describe them in detail. Mr. Hayward asked Ms. Stewart to
 14 provide him with a copy of the policy that allegedly forbade Freedom Foundation’s leafletting
 15 activity in the public areas of the building.

16 26. The following day, Ms. Stewart sent an email referencing “Policy 14-10” as the primary
 17 authority that forbade Freedom Foundation’s planned activity. She attached a PDF copy of the
 18 policy.

19 27. “Administrative Policy 14-10” is part of chapter 14, “Facilities and Vehicles,” in a
 20 Department of Ecology manual (Exhibit 2). The policy’s purpose is “to establish standards for
 21 using Ecology facilities that will accomplish the following:

- 22 • Ensure outside agencies/visitors are treated fairly and consistently when visiting
 23 Ecology facilities.
- 24 • Ensure parking is managed so building occupants and clients have adequate parking
 25 space.
- 26 • Ensure facilities are properly secured during meetings and events occurring on-site.
- 27 • Ensure compliance with Ecology Policy 15-01, Prohibiting Private Use of State
 28 Resources.”

1 The policy applies when anyone requests use of Ecology owned or leased facilities.

2 28. Subsection 2 of 14-10 has a heading that states, “Visitors May Not Use Ecology Facilities
3 to Promote or Conduct Commercial Enterprise.” The rule goes on to say, “Visitors also may not
4 use Ecology facilities to promote or solicit for an outside organization or group. The only
5 exceptions are public hearings or meetings held according to this policy, or activities approved as
6 a charitable activity according to Policy 15-01.” Policy 15-01 says a charitable activity must be
7 authorized by the Director of Ecology.

8 29. Ms. Stewart did not explain how this rule 14-10 prohibited Freedom Foundation from
9 passing out leaflets that did not promote Freedom Foundation or contain any reference to the
10 Foundation.

11 30. A Freedom Foundation canvasser visited the Ecology headquarters on the morning of
12 December 14, 2017, and handed out leaflets outside the building. Later that afternoon, a canvasser
13 visited with a Freedom Foundation attorney.

14 31. The canvasser was dressed in a Santa costume and she held a green and red poster (Exhibit
15 3). The top half of the poster contained a phrase in large font: “WFSE has been naughty.” In the
16 lower half, also in large font, a web address was displayed: OptOutToday.com.

17 32. Additionally, the canvasser carried candy canes and copies of a leaflet to hand out to
18 passersby. The leaflet, bordered in red, was a small paper with a stylized title that said “Santa’s
19 List” (Exhibit 4). The heading below the title stated, “Naughty Union Facts.” In smaller font, the
20 leaflet went on as follows:

21 WFSE has long claimed it doesn’t spend members’ dues on politics, but a recent
22 investigation by the state Public Disclosure Commission proved this is simply false.
23 The union’s attorney admitted it operates a “separate segregated fund” (SSF) to
24 make political contributions, explaining, “WFSE’s SSF is managed, operated,
25 funded and directed entirely by WFSE itself. Greg Devereux, WFSE’s Executive
26 Director, makes all final approvals of monies provided to and spent from the
27 SSF...” WFSE’s SSF made \$975,000 in political contributions last year alone.
28 Every penny came from state employees’ dues. No matter your political views, state
workers shouldn’t have their dues used for Greg Devereux’s political agenda
without their knowledge and permission. Thankfully, your ability to avoid
supporting WFSE’s political expenditures is constitutionally protected.

1 The leaflet's footer said: "To learn more about your rights, visit *OptOutToday.com/WFSE*."

2 33. The canvasser and attorney were granted access to the building, and the canvasser began
3 handing out the "Santa's List" leaflet in the lobby.

4 34. The Department of Ecology's lobby area has glass walls on two sides with some seating in
5 the middle. A sign-in desk sits at one end of the lobby with hallways leading further into the
6 building at the opposite end. The lobby is in the middle of the building with office towers on either
7 side. People frequently pass through the lobby or mill about in the open space.

8 35. Within a few minutes, Ms. Stewart, accompanied by security guards, arrived and reiterated
9 that Freedom Foundation would not be allowed to hand out leaflets in the lobby or any other
10 portion of the building. She again referred to an alleged agency policy, stating that organizations
11 cannot promote themselves on state property.

12 36. The Foundation attorney responded that Freedom Foundation was not promoting its
13 organization but instead engaging in an information campaign. Ms. Stewart again insisted that the
14 Freedom Foundation would have to leave based on the advice of state attorneys.

15 37. The Freedom Foundation attorney then noted that Ecology had allowed the union to use
16 the lobby just two weeks prior for a membership drive. Ms. Stewart responded that the union had
17 a privileged right to use the lobby for expressive activity because it is the exclusive bargaining
18 representative of the employees. Ms. Stewart claimed that the union was therefore not an "outside
19 organization."

20 38. The Freedom Foundation attorney asked what policy allowed the union's privileged use of
21 public property for expressive activity. Ms. Stewart responded that the Collective Bargaining
22 Agreement granted them the privilege. Ms. Stewart could not, however, cite to a particular portion
23 of the Collective Bargaining Agreement (CBA).

24 39. Although Ms. Stewart did not reference any portion of the CBA, the CBA does contain
25 some language relating to union use of and access to public property. Article 39.1(B)(2) of the
26 CBA says union representatives, with notice, can access offices and facilities in accordance with
27 agency policy to perform "representational activities." Article 39.3(A) of the CBA says that "[t]he

1 Employer's offices and facilities may be used by the Union to hold meetings, subject to the
2 agency's policy, availability of the space and with prior authorization."

3 40. The CBA contains no language forbidding other organizations or advocacy groups from
4 use of public property for expressive activities.

5 41. Nonetheless, Ms. Stewart remained firm that agency policy disallowed Freedom
6 Foundation from canvassing in the lobby. The Freedom Foundation staff departed.

7 42. After the event, Ms. Stewart sent an email to several attorneys at the state attorney general's
8 office and several Ecology officials to recount the event. Ecology officials also discussed the event
9 at a subsequent meeting.

10 43. Later, Freedom Foundation attorneys contacted the state attorney general's office regarding
11 the incident. The assistant attorney general informed Freedom Foundation that Ecology remained
12 firm in its position that Freedom Foundation would not be allowed to canvass in the lobby.

13 **CLAIM FOR RELIEF**

14 44. Freedom Foundation incorporates the allegations in prior paragraphs.

15 45. The First Amendment to the United States Constitution, as applied to the States through
16 the Fourteenth Amendment, forbids governments from restraining speech in public fora in order
17 to suppress a viewpoint or without good cause.

18 46. Ecology has an on-going policy and practice of excluding Freedom Foundation from
19 handing out leaflets in the public lobby of the Department's headquarters. It enforced this policy
20 directly against Freedom Foundation in December 2017. Ecology thus maintains and actively
21 enforces a policy under color of state law that deprives Freedom Foundation of its right to free
22 speech, in violation of the First Amendment to the United States Constitution, as applied to the
23 States through the Fourteenth Amendment and 42 U.S.C. § 1983.

24 47. Freedom Foundation has no adequate remedy at law to compensate for the loss of this
25 fundamental freedom and will suffer irreparable injury absent an injunction restraining Ecology
26 from enforcing its discriminatory exclusion policy.

1 48. Freedom Foundation is therefore entitled to declaratory and permanent injunctive relief
2 against continued enforcement and maintenance of Ecology's unconstitutional policies and
3 practices. *See* 28 U.S.C. §§ 2201, 2202.

4 **PRAYER FOR RELIEF**

5 Wherefore, Freedom Foundation respectfully requests that this Court enter judgment in its favor
6 as follows:

7 A. Declare that Ecology's practice and policy of forbidding Freedom Foundation from
8 expressing its views in a nondisruptive manner on public property violates the First
9 Amendment;

10 B. Permanently enjoin Ecology, its officers, agents, servants, employees, and all persons in
11 active concert or participation with them from enforcing this policy;

12 C. Award Freedom Foundation its costs, attorneys' fees, and other expenses in accordance
13 with law, including 42 U.S.C. § 1988; and

14 D. Order such additional relief as may be just and proper.

15 DATED: May 13, 2019.

16 Respectfully submitted,

17 By: s/ BRIAN T. HODGES

18 By: s/ ETHAN W. BLEVINS

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2019, I served the foregoing on the following persons by the means indicated:

Emily C. Nelson, Assistant AG Attorney General of Washington Ecology Division P.O. Box 40117 Olympia WA 98504-0117 Emily.nelson@atg.wa.gov ECYOLYEF@atg.wa.gov	<input checked="" type="checkbox"/> Email <input type="checkbox"/> U.S. First Class <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> E-Service/ECF <input type="checkbox"/> Other
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s/ ETHAN W. BLEVINS
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Attorney for Plaintiff